

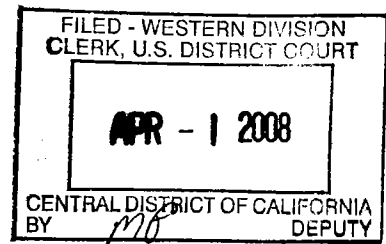
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ISAGANI DE LA PENA,

Petitioner,

v.

S.A. HOLENCIK,

Respondent.

NO. CV 07-7150-R (AGR)

ORDER TRANSFERRING
ACTION TO UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF GUAM

I.

SUMMARY OF PROCEEDINGS

Petitioner is in custody at Federal Correctional Institution - Victorville in Adelanto, California, which is in the Central District of California. In 2001, a jury convicted Petitioner in the District of Guam on drug and weapons charges. (Petition, Memo at 1-2.) Petitioner was sentenced to 365 months in prison. (Petition at 2.) On February 26, 2003, the Ninth Circuit affirmed the conviction. (Id.) On July 7, 2005, the trial court in the District of Guam denied Petitioner's motion made pursuant to 28 U.S.C. § 2255. (Id.)

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1 On October 31, 2007, Petitioner filed a Petition for Writ of Habeas Corpus
2 pursuant to 28 U.S.C. § 2241 in this Court in which he raised two grounds: (1)
3 double jeopardy and (2) ineffective assistance of counsel.

4 On January 16, 2008, Respondent filed a motion to dismiss, arguing that
5 the petition should be dismissed for lack of jurisdiction. On March 7, 2008,
6 Petitioner filed a reply.

7 The matter is now under submission. For the reasons described below, the
8 action must be transferred to the District of Guam.

9 II.

10 **DISCUSSION**

11 “[T]o determine whether jurisdiction is proper, a [federal] court must first
12 determine whether a habeas petition is filed pursuant to § 2241 or § 2255 before
13 proceeding to any other issue.” *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th
14 Cir. 2000) (per curiam). A § 2255 motion must be filed in the sentencing court.
15 28 U.S.C. § 2255 (a prisoner may “move the court which imposed the sentence to
16 vacate, set aside or correct the sentence”). On the other hand, a § 2241 petition
17 must be filed in the district in which the prisoner is in custody. *Braden v. 30th*
18 *Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95, 93 S. Ct. 1123, 35 L. Ed. 2d
19 443 (1973). A federal prisoner may not substitute a § 2241 petition for a § 2255
20 motion. *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) (“The remedy
21 afforded under § 2241 is not an additional, alternative or supplemental remedy to
22 that prescribed under § 2255”); see also *Porter v. Adams*, 244 F.3d 1006, 1007
23 (9th Cir. 2001) (“Merely labeling a section 2255 motion as a section 2241 petition
24 does not overcome the bar against successive section 2255 motions”).

25 “[M]otions to contest the legality of a sentence must be filed under § 2255 .
26 . . . , while petitions that challenge the manner, location, or conditions of a

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1 sentence's execution must be brought pursuant to § 2241."¹ *Hernandez*, 204
2 F.3d at 864 (citations omitted).

3 Petitioner clearly challenges the legality of the sentence imposed. In Count
4 3, Petitioner was convicted of distribution of methamphetamine within 1000 feet
5 of a playground. In Count 2, he was convicted of distribution of
6 methamphetamine. (Petition, Memo at 2-3.) In Ground One, Petitioner argues
7 that Count 2 is a lesser included offense of Count 3, and that conviction on both
8 counts violates double jeopardy. (*Id.* at 3.) In Ground Two, Petitioner argues that
9 his trial counsel was ineffective for failing to object to the alleged violation of
10 double jeopardy. (*Id.* at 5.)

11 Petitioner acknowledges that normally § 2255 would be the appropriate
12 mechanism for testing the legality of his detention. (*Id.* at 3.) However, he said
13 he couldn't properly raise the double jeopardy ground at the time of the filing of
14 his § 2255 motion on January 23, 2004, because the case he relies on, *United*
15 *States v. Perry*, 389 F. Supp. 2d 278, 285 (D.R.I. 2005), had not yet been
16 decided. (*Id.* at 4.) Consequently, Petitioner argues that he did not have an
17 "unobstructed procedural shot" in his original § 2255 motion and that he is "legally
18 innocent" of the lesser included offense. (*Id.*)

19 Petitioner's claim that his petition comes under § 2255's savings clause is
20 meritless. Section 2255 provides:

21 An application for a writ of habeas corpus in behalf of a prisoner who
22 is authorized to apply for relief by motion pursuant to this section,
23 shall not be entertained if it appears that the applicant has failed to
24 apply for relief, by motion, to the court which sentenced him, or that
25 such court has denied him relief, unless it also appears that the

26
27 ¹ For example, a challenge to the Parole Commission's "decision in setting
28 [the] term of parole" would be brought by petition under § 2241. See *Doganieri*
v. United States, 914 F.2d 165, 169-70 (9th Cir. 1990), *cert. denied*, 499 U.S. 940
(1991).

1 remedy by motion is inadequate or ineffective to test the legality of
2 his detention.

3 Because Petitioner has already made a § 2255 motion that was denied,
4 this Court has jurisdiction only if Petitioner's "remedy by motion is inadequate or
5 ineffective to test the legality of his detention." 28 U.S.C. § 2255; see *Moore v.*
6 *Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999), *cert. denied*, 528 U.S. 1178 (2000).
7 This language in § 2255 has been labeled the "savings clause" (*Hernandez*, 204
8 F.3d at 864-65) or the "escape hatch" (*Stephens v. Herrera*, 464 F.3d 895, 898
9 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1896 (2007)).

10 In 1997, the Ninth Circuit had not "fully explained" when the "savings
11 clause" applied but had "recognized that it is a narrow exception." *United States*
12 *v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). By 2000, the Ninth Circuit
13 acknowledged that other circuits had held that the savings clause was available
14 to a prisoner "who is 'actually innocent' of the crime of conviction, but who never
15 has had 'an unobstructed procedural shot' at presenting a claim of innocence."
16 *Lorentsen v. Hood*, 223 F.3d 950, 953-54 (9th Cir. 2000). Although *Lorentsen*
17 declined to formally adopt this formulation, it nonetheless found that its petitioner
18 would not be entitled to relief because he was not "actually innocent." *Id.* at 954.

19 "To establish actual innocence, petitioner must demonstrate that, in light of
20 all the evidence, it is more likely than not that no reasonable juror would have
21 convicted him." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604,
22 140 L. Ed. 2d 828 (1998) (citation and internal quotation marks omitted).

23 "Petitioner bears the burden of proof on this issue by a preponderance of the
24 evidence, and he must show not just that the evidence against him was weak, but
25 that it was so weak that 'no reasonable juror' would have convicted him [citation
26 omitted]. . . . [T]he parties are not limited to the existing trial record; the issue is
27 'factual innocence, not mere legal insufficiency.'" *Lorentsen*, 223 F.3d at 954
28 (quoting *Bousley*, 523 U.S. at 623).

1 In *Ivy v. Pontesso*, 328 F.3d 1057, 1059-60 (9th Cir.), *cert. denied*, 540
2 U.S. 1051 (2003), the Ninth Circuit implicitly adopted the other circuits'
3 formulation of the "escape hatch." See also *Stephens*, 464 F.3d at 898 ("we have
4 held that a § 2241 petition is available under the 'escape hatch' of § 2255 when a
5 petitioner (1) makes a claim of actual innocence, and (2) has not had an
6 'unobstructed procedural shot' at presenting that claim").

7 Petitioner has not satisfied the requirements of the savings clause.
8 Petitioner alleges he did not have an "unobstructed procedural shot" at presenting
9 his constitutional claims in his § 2255 motion because the law was not decided at
10 the time of his § 2255 motion in 2004. (Petition, Memo at 4.) However, as
11 Petitioner himself acknowledges later in his petition, this is false. (*Id.* at 5 (citing
12 to *United States v. Kakatin*, 214 F. 3d 1049, 1051 (9th Cir.) ("We agree with
13 Defendant, as does the government, that § 841(a) is a lesser-included offense of
14 the crime described in § 860.") (citation omitted)), *cert. denied*, 531 U.S. 911
15 (2000).) The law on this issue was well-settled before Petitioner's § 2255 motion
16 filed on January 23, 2004. (Exh. A to Vandeveld Declaration.)

17 Petitioner also argues he is "legally innocent" of the lesser included
18 offense. (Petition, Memo at 4.) However, the savings clause requires he be
19 "actually innocent." *Loretsen*, 223 F.3d at 954. As *Bousley v. United States*,
20 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) explains in the context
21 of a procedural default,² "actual innocence means factual innocence, not mere
22 legal insufficiency."³ *Id.* at 623 (citation and internal quotation marks omitted).

23
24 ² *Loretsen* cited to *Bousley* for the definition of "actual innocence."
25 *Loretsen*, 223 F.3d at 954.

26 ³ Petitioner's citation to *In re Smith*, 285 F.3d 6 (D.C. Cir. 2002) is
27 unavailing. First, the court found that Smith had not made a prima facie showing
28 under § 2255 to obtain authorization to file a successive § 2255 motion. *Id.* at 7-
8. Thus, the court's statement that Smith could file a § 2241 petition in a district
in the Seventh Circuit was dicta and was based on the Seventh Circuit's
interpretation of the § 2255 savings clause. *Id.* at 8. Second, unlike Petitioner,

1 Petitioner's claim is not that he was actually innocent of either charge, just that he
2 should not have been punished for both.

3 Accordingly, pursuant to 28 U.S.C. § 1631, this action should be
4 transferred to the sentencing court, the United States District Court for the District
5 of Guam, which has jurisdiction over Petitioner's claim. *See Hernandez*, 204 F.3d
6 at 866.

7 **III.**

8 **CONCLUSION**

9 It is therefore ORDERED that this action be transferred to the United
10 States District Court for the District of Guam, and that the Clerk of this Court
11 effect such transfer.

12 It is further ORDERED that the Clerk serve copies of this Order on the
13 parties.

14
15 Dated: March 31, 2008

16 
17 _____
18 MANUEL L. REAL
19 United States District Judge

20 Presented by:

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22 _____
23 ALICIA G. ROSENBERG
24 United States Magistrate Judge

25
26
27 _____
28 Smith was "actually innocent" of the charged crime because of a subsequent
interpretation of the charging statute by the United States Supreme Court. *Id.* at
7, 8.